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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 346.

UNITED STATES OF AMERICA, *Petitioner*,

v.

SOCONY-VACUUM OIL CO., INC., ET AL.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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The opinion of the District Court (R. 2488) is reported in 23 F. Supp. 937. The opinion of the Circuit Court of Appeals (R. 3911) is not yet reported.

QUESTION PRESENTED.

We agree with the following statement of the Petitioner as to the question presented by its petition:

> ". . . The trial court instructed the jury that if it found that the defendants had the power to raise gasoline prices and had combined for that purpose, the restraint of trade was unreasonable and illegal. The principal question presented is whether this instruction was reversible error." (Pet. 2)[1]

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[1] Citations to the petition are designated herein by the abbreviation "Pet."

SUMMARY OF ARGUMENT.

1. A concerted effort to eliminate abuses which threaten the competitive system is not to be condemned merely because it results in or tends to result in higher prices. *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344 (1933).

2. The Petitioner concedes the presence of substantial evidence, that the purchasing activities of the defendants "were confined to 'distress material,' the removal of which did not suppress normal competition." (Pet. 14) The removal of any competitive abuse like distress gasoline would necessarily tend to produce fairer or higher price levels.

3. Contrary to the decision in the *Appalachian Coals* case and other cases cited, however, the trial court instructed the jury to return verdicts of guilty, without further examination of the facts, if it found that the purpose or effect of eliminating this abuse was to produce higher—*i. e.,* fairer—price levels. This instruction in effect directed the jury to return verdicts of guilty even though it accepted the respondents' view of the facts.

STATEMENT.

The Petitioner's argument that the trial court's instructions did not constitute reversible error is based in part upon the assumption that this Court must accept its conclusion as to the evidence in the case. The respondents deny that there is substantial evidence to support many of the conclusions upon which the Petitioner's argument is based.[2] For the purposes of this brief, however, it is unnecessary to review the evidence in detail because the petition contains concessions as to the evidence which we be-

[2] As shown hereinafter, however, the trial court's instructions would constitute reversible error even if there were substantial evidence for these conclusions. (See p. 9, *infra*).

lieve are conclusive. The Petitioner does not claim that the evidence which it sets forth was undisputed. Instead it says:

> ". . . The real purpose and practical effect of the buying program was, however, *sharply contested* by the respondents. The evidence *relied upon by the Government* may be summarized as follows:" (Pet. 7, Italics supplied)

Then, after stating (Pet. 11, 13) that there was "*substantial* evidence" (not, it will be noted, "undisputed evidence") to support the conclusions upon which its argument is based, the Petitioner says:

> ". . . The defendants, on the other hand, offered evidence designed to show (1) that they did not combine together for the purpose of controlling prices; (2) that their purchasing activities were confined to 'distress' material, the removal of which did not suppress normal competition on the spot markets; . . ." (Pet. 14)

For a summarized statement of facts, we respectfully direct the attention of this Court to the opinion of the Circuit Court of Appeals which amply supports these concessions.

ARGUMENT.

I.

The Circuit Court of Appeals Correctly Held that the Trial Court Had Committed Reversible Error in Its Instructions to the Jury.

The Petitioner states that the principal question presented is whether the trial court committed reversible error in instructing the jury that

> ". . . if it found that the defendants had the power to raise gasoline prices and had combined for that purpose, the restraint of trade was unreasonable and illegal. . . ." (Pet. 2)

It will be noted that this instruction is not concerned with whether the respondents have maintained prices at *controlled* levels (*cf.* Pet. 2) or whether they have *eliminated price competition* on the spot market (*cf.* Pet. 18-19) or otherwise *fixed* prices. The sole test of legality which this instruction lays down is whether the purpose or effect of the respondents' acts has been to raise gasoline prices. The Petitioner apparently does not claim that such an instruction would be correct if applied to any case involving a combination which contributed to a rise in price, but only that such an instruction did not constitute reversible error in *this* case. At the outset, therefore, we are faced with the question of what the facts submitted to the jury disclose.

Certain facts about the combination are not in dispute:

1. There is no dispute that distress gasoline in the hands of independent refiners had been a competitive evil which had driven the price of gasoline below the cost of production. (R. 385-6, 642, 671-2, 751-2, 929, 1003, 1166, 1327) As the Circuit Court of Appeals said:

> ". . . If there is any one thing completely established, it is that the oil industry, as well as numerous Governmental agencies, Federal and State, have recognized surplus crude oil and surplus gasoline as a distress product, the elimination of which was not only desirable, but necessary, if the industry was to survive, to say nothing of prospering. . . ." (R. 3929)

2. There is no dispute that the defendants' combination was a program to purchase distress gasoline from independent refiners. (Pet. 8-9)

3. There is no dispute that the removal of the depressing effect of distress gasoline tended to permit the price of gasoline to seek its normal level. The Final Report of the Secretary of the Interior for the year 1935, introduced by the respondents, discusses the factors which contributed to the price rise in 1935, as follows:

"The operations of the Tender Board, of the production provisions of the code and refinery amendment, *and of the stabilization committee of the planning and coordination committee*[3] *with the cooperation of the Petroleum Administrative Board*, brought the desired parity between the wholesale price of gasoline and crude oil in the spring of 1935 . . ." (Def. Ex. 917A, R. 3525, Italics supplied).

It was on these undisputed facts that, as the Petitioner says, the trial court instructed the jury to return verdicts of guilty if they found that the respondents had the power or the purpose to raise prices. (Pet. 2) Obviously the elimination of a competitive abuse such as distress gasoline may tend to stabilize the industry and to produce fairer price levels. The instruction of the trial court, therefore, required a finding of guilty even though the jury believed that the respondents' activities had been limited to the elimination of distress gasoline and that they had affected or raised prices only through the elimination of that abuse.

This Court has repeatedly held that a concerted effort to eliminate abuses which threaten the competitive system is not to be condemned merely because it results in or was intended to result in higher prices.

American Tobacco Co. v. *United States*, 221 U. S. 106, 177 (1911);
Appalachian Coals, Inc. v. *United States*, 288 U. S. 344, 373-4 (1933);
Sugar Institute, Inc. v. *United States*, 297 U. S. 553, 597-8 (1936);
Window Glass Mfgrs. Assn. v. *United States*, 263 U. S. 403, 413 (1923);
Standard Oil Co. (Ind.) v. *United States*, 283 U. S. 163, 175, 179 (1931);
Chicago Board of Trade v. *United States*, 246 U. S. 231, 238 (1918).

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[3] The Tank Car Stabilization Committee which operated the Mid-Continent buying program was a sub-committee of the General Stabilization Committee of the Planning & Coordination Committee. (R. 1169, 1696-7)

Appalachian Coals, Inc. v. *United States,* 288 U. S. 344 (1933) stands as a direct and inescapable challenge to the accuracy of the instruction of the court below and to the contention of the Government in its Petition, that any agreement shown by the evidence constituted *per se* a violation of the Sherman Act merely because price raising or price affecting was involved.

In that case the defendant producers formed "an exclusive selling agency," Appalachian Coals, Inc., whose stock was owned by the defendant producers in proportion to their production. The selling agency agreed to sell all of the coal produced at the best prices obtainable but the selling agency was exclusively to determine what that price should be. The effect of this agreement was to compel the agency to sell at the going market price.

With respect to the purposes of the combination it appeared that Appalachian Coals, Inc., was formed to deal with competitive abuses which had driven the price of coal below cost. The most important of these abuses was the sale of distress coal below the going market price.

The District Court found, and the Supreme Court accepted its finding, that the elimination of competition between the defendants would "have a tendency to stabilize prices and to raise prices to a higher level than would prevail under conditions of free competition." (288 U. S. at 359.) The intent, effect and purpose of the agreement were thus to raise prices. Tested by the instruction of the trial court in the instant case the combination would have been *per se* unlawful.

This Court held, however, that the combination was lawful, pointing out that:

> ". . . A cooperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. Voluntary action to

rescue and preserve these opportunities, and thus to aid in relieving a depressed industry and in reviving commerce by placing competition upon a sounder basis, may be more efficacious than an attempt to provide remedies through legal processes. The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that co-operative endeavor to correct them necessarily constitutes an unreasonable restraint of trade. . . ." (288 U. S. at 373-4)

As we have shown above, there was undisputed evidence in this case which would have justified the jury in finding that the respondents' activities were identical in purpose and effect with those involved in the *Appalachian Coals* case. The trial court flatly and repeatedly[4] instructed the

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[4] The following excerpts from the charge of the Court are typical of the instructions given:

". . . It is illegal and a violation of the Sherman Law for a group of individuals or corporations, or both, to act together to raise the prices to be charged for the commodity which they manufacture, where they control a substantial part of the interstate trade and commerce in that commodity.

* * *

"If you come to the conclusion from the evidence in this case that these defendants possessed the power to raise the price of gasoline to be sold in the ten Middle Western states, and that there was the purpose to exert that power, then the combination became, from the time that this purpose appeared, an illegal one, and a conspiracy in restraint of trade, and the defendants participating therein are guilty of the offense charged in the indictment.

* * *

". . . It is sufficient that the circumstances shown satisfy you to the extent I have indicated, that the parties thereto were acting together toward a common end, and that that end was the raising of prices charged as the object of the alleged conspiracy.

* * *

"However, if you should find that through the purchase of so-called distress gasoline, defendants and the independent refiners and others acting in cooperation with them had the power, and combined for the purpose of directly affecting and raising the level of spot market prices, then, as I have previously stated, the restraint of trade was as a matter of law undue and unreasonable and, therefore, illegal." (Assignment of Error No. 43, R. 2553-4)

jury that if it found "that these defendants possessed the power to raise the prices of gasoline to be sold in the ten Middle Western states, and that there was the purpose to exert that power, then the combination became, from the time that this purpose appeared, an illegal one, and a conspiracy in restraint of trade, and the defendants participating therein are guilty of the offense charged in the indictment." (R. 2409) Again it instructed the jury that "If from all the evidence before you, you find not only that there was concerted action, that is, action together, of the defendants, but that it sought to accomplish the illegal purpose of raising the price of gasoline to any extent, then it would follow that the acts and declarations of any one or more of the conspirators in furtherance of the conspiracy are binding upon all the others . . ." (R. 2409) Under such instructions, the sole criterion by which the jury was to judge the guilt or innocence of the respondents was whether their activities did or would result in raising prices.

The Petitioner, attempting to defend the instructions in question, claims that the evidence disclosed something more than a mere combination which produced higher price levels through the elimination of a competitive abuse. It states that the respondents sought to maintain prices *"at controlled levels."* (Pet. 2) From this statement it argues that this case, like *United States* v. *Trenton Potteries,* 273 U. S. 392, involved a combination among the defendants "to eliminate price competition among themselves." (Pet. 18-19)

A comparison of the instruction in question with the opinion in the *Trenton Potteries* case will show at once that this argument is untenable. In the instant case, the trial court's instruction made the issue of guilt or innocence dependent *entirely* upon the question of whether the respondents had possessed and exercised the power *to raise prices.* In the *Trenton Potteries* case, on the other hand, the Court was not concerned with whether the purpose and effect was to raise or lower prices.[4] It expressly refused to make the

issue of guilt or innocence depend upon whether the combination had produced reasonable or unreasonable prices, saying:

> ". . . in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable. . . ." (273 U. S. at 398)

The true ground of decision in the *Trenton Potteries* case, as the Petitioner itself concedes, (Pet. 18) was that the defendants there had the power and purpose to eliminate all play of competition in the determination of market price and to substitute an agreed-on arbitrary market price for a competitive one. The determining factor was the destruction of market competition, not whether prices were higher or lower, reasonable or unreasonable. In this case, however, it is established by the conclusion of the Circuit Court of Appeals that ". . . it cannot be held that competition on the spot market was eliminated." (R. 3933) Obviously, the instruction now before this Court *which failed even to mention the effect of the combination on competition* was highly prejudicial to respondents and cannot be sustained on the authority of the *Trenton Potteries* case.

If this case did contain any substantial evidence that the respondents had eliminated or restrained competition in the sale of gasoline on the spot market, (which the respondents deny), that evidence was contradicted, if not over-

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[5] The instruction which this Court sustained in the *Trenton Potteries* case was summarized by the Court as follows:

> "The trial court charged, in submitting the case to the jury, that if it found the agreements or combination complained of, it might return a verdict of guilty without regard to the reasonableness of the prices fixed, or the good intentions of the combining units, whether prices were actually lowered or raised or whether sales were restricted to the special jobbers, since both agreements of themselves were unreasonable restraints. . . ." (273 U. S. at p. 395)

come, by other evidence to the contrary. Again, the Petitioner itself concedes this. It says:

> ". . . The defendants . . . offered evidence designed to show (1) that they did not combine together for the purpose of controlling prices; (2) that their purchasing activities were confined to 'distress' material, the removal of which did not suppress normal competition on the spot markets; . . ." (Pet. 14)

Thus, there was concededly presented in the trial court a conflict of evidence[6] as to whether the purpose and effect of the agreement established was to fix prices "at controlled levels" or, by eliminating the effect of a competitive abuse, to contribute to a rise in price from below the cost of production to a normal competitive level.

On a record which disclosed facts consistent with the conclusion that the respondents had not fixed prices at non-competitive levels and consistent with the conclusion that they had done nothing more than eliminate a competitive evil which tended to depress prices below normal levels, it was obviously incumbent upon the trial court to instruct the jury as to their duty in the event that they accepted such facts. Instead of doing so, however, the court instructed the jury that the sole criterion by which they were to judge the guilt or innocence of the respondents was whether their activities had had the purpose or effect of raising prices.[7] If the jury found that such was the purpose and effect of the combination it was directed to return a verdict of guilty

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[6] The Circuit Court of Appeals recognized that the facts were in dispute, saying:

> "The case was submitted to the jury upon the theory that the combination charged was unlawful *per se*. This, in our judgment, was error such as to require a reversal. Under such circumstances, it ordinarily would serve no useful purpose to enter into a discussion of the evidence as it relates to the character of the restraint imposed. We think it is pertinent, however, to make brief reference to the contentions of the respective parties in this respect by way of demonstrating that the character of the restraint was a jury question and not one to be declared unlawful *per se*. (R. 3932 *cf.* R. 3934)

[7] See p. 7, *supra*.

without further examination of the surrounding facts and circumstances.[8]

II.

The Instructions of the Trial Court Improperly Limited the Extent to Which the Jury Could Consider the Facts and Circumstances Surrounding the Defendants' Activities.

The Petitioner, having conceded that the respondents introduced substantial evidence showing that their activities did not unreasonably restrain trade, argues that the conflict of evidence was properly submitted to the jury and determined adversely to the respondents. It says: "The jury was expressly instructed to ascertain the cause for the price rise and subsequent rigidity and to acquit the defendants unless it found that the price increase and its continuance at the level shown by the evidence was caused by the combination." (Pet. 25) It is therefore asserted that the finding of the jury must be accepted as final.

The instruction relied upon to support this claim reads as follows:

> "Now, unless you find from the testimony and believe beyond a reasonable doubt that the said price increase, and its continuance at the level shown by the evidence was caused by an unlawful agreement or combination of the defendants, as alleged in the indictment, and as heretofore defined and explained to you, and not caused by the factors aforesaid, then it is your duty to acquit the defendants and to return verdicts of 'not guilty.'" (R. 2407, cited Pet. 25, n. 46)

This instruction, however, flatly condemns the price rise if brought about by a combination "as heretofore defined and explained to you." As we have previously demonstrated, and as the opinion of the Circuit Court of Appeals for the Seventh Circuit clearly points out, the trial court had repeatedly instructed the jury that any combination

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[8] See p. 12, *infra*.

having *the effect or purpose of raising prices* was an unlawful combination. This fundamental error was merely carried over into and perpetuated in the instruction cited by the Petitioner.

In fact the jury was not permitted to consider the evidence relied upon by the respondents even to the limited extent indicated by the instruction quoted above. For, the trial court also instructed the jury:

> "You will also understand that if you find an illegal combination to have existed among all or some of the defendants, having for its purpose the raising of prices, it does not matter that there may have been also other factors which contributed to the raising of the prices, as, for example, the existence of the Connally Act, . . ." (R. 2405)

The trial court also instructed the jury:

> "If you should find that the defendants acting together, and those independent refiners found acting in concert with them, did not have the power to raise the level of spot market prices in the spot markets referred to in the indictment, or that they did not combine for that purpose, and if you should find also that the purchase of the said gasoline by the defendants affected the spot market prices only indirectly and incidentally, then you may consider all the circumstances surrounding the activities of the defendants to determine whether they were intended to and did merely eliminate abuses which tended to produce destructive competition and restore competition to a fairer basis and produce fairer price levels. In such event, you may conclude that the purchase of such gasoline in the manner shown by the evidence was reasonable and beneficial and not injurious to the public interest and that, therefore, the restraint of trade was not undue and not illegal, and you may acquit the defendants." (R. 2414)

Thus the jury was authorized, and in view of other instructions was required, if it found that the power to raise prices existed or that the respondents had combined for that purpose, to find guilt without being permitted to look at the

facts and circumstances surrounding the activities of the defendants. The importance of the evidence in this case concerning the surrounding facts and circumstances is shown by the Circuit Court of Appeals' description of some of the evidence which the jury was forbidden to consider. The Circuit Court said:

> ". . . when considered in connection with other circumstances, it [the evidence relied on by the government] is not so convincing and certainly not conclusive. For instance, the passage of the Connally Act, which went into effect in February, 1935, undoubtedly played a prominent part in the increase and maintenance of the price level. At any rate, it is disclosed that in prior instances, where the transportation of 'hot oil' was prohibited, a similar increase in prices was experienced. Another circumstance which militates against the importance of the rigidity of the price level is the fact that the price of gasoline outside the Mid-Western area was actually higher during the indictment period than it was within. It also is worthy of note that the price to which it is claimed to have been arbitrarily raised and maintained was at no time above that which was regarded by the Government and industry, as a parity price.
>
> * * * * * *
>
> "There are other factors which it is argued entered into the increase in the price level of gasoline. It is pointed out that at the time of the marked increase in the price of gasoline there was likewise a marked increase in commodity prices in general and that at least a part of the increase is attributable to natural causes. It is disclosed that there are many large refiners outside the Mid-Western area but so near the territory that the product is readily obtainable. In many cases the freight rate from these outside refiners to important points within the territory is actually less than from refiners located within the territory. . . ." (R. 3933-4)

There was also the evidence clearly negativing any agreement of independent refiners with the defendants as to the price they would charge jobbers and amply sustaining

the conclusion of the Circuit Court of Appeals that the play of competition in these sales by independent refiners to jobbers in the spot market went on as before. (R. 3932)

At most there was a conflict of instructions which merely resulted in confusing and misleading the jury as to when and for what purposes it could consider the circumstances surrounding the activities of the defendants. The Petitioner itself argues that the instructions confused and misled the Circuit Court of Appeals. At page 18 of the Petition it states that the Circuit Court of Appeals "misunderstood the scope of the issues submitted to the jury by the trial court's instructions." If, after a careful and deliberate study of the record and the charge, three judges of the Circuit Court of Appeals "misunderstood" the meaning of the instructions to the jury, how can the Government now ask this Court to find that the jury in the heat and the pressure of the trial did not likewise misunderstand the instructions. Even if we could accept the Petitioner's view of the instructions we would still be faced with the situation which this Court found in *District of Columbia* v. *McElligott*, 117 U. S. 621, 630 (1886) where it said:

> ". . . The charge was inconsistent with the instructions previously given, and was calculated to mislead the jury, for it submitted to them a question which those instructions had, in effect, if not in terms declared to be immaterial in the case."*

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* In accord are:

Ward v. *Cochran*, 150 U. S. 597, 610 (1893);
Erhardt v. *United States*, 268 Fed. 326 (C. C. A. 7th, 1920);
McLean Medicine Co. v. *United States*, 253 Fed. 694, 696 (C. C. A. 8th, 1918);
Kuhn v. *United States*, 42 F. (2d) 210, 211 (C. C. A. 3rd, 1930);
DeGroot v. *United States*, 78 F. (2d) 244, 253 (C. C. A. 9th, 1935).

CONCLUSION.

For the reasons stated, we respectfully submit that the petition filed on behalf of the United States clearly fails to state any tenable grounds for granting the writ of certiorari.

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